

¹ It should be noted claimant's application for review listed 17 issues but some issues such as entitlement to temporary total disability and the effect of claimant's alien status on that issue as well as entitlement to payment of medical bills are not jurisdictional issues subject to appeal from a preliminary order.

Respondent and its insurance carrier, Connecticut Indemnity Company, argue claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment or that he provided timely notice. Consequently, the ALJ's Order should be affirmed. In the alternative, it is argued claimant's date of accident would be his last day of work on April 30, 2002, and that Connecticut Indemnity Company's coverage ended on June 9, 2001.

Respondent and its insurance carrier, Liberty Mutual Insurance Company, argue claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment or that he provided timely notice. It is further argued claimant failed to establish just cause for his failure to provide notice within 10 days. Consequently, they argue the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant's job required him to cut and clean battery plates. The claimant testified that he gradually began to experience pain in his arms. In approximately February 2002, claimant sought treatment from the plant nurse. Because he could not speak English, claimant took a friend with him when he went to the nurse's office.

Claimant, through his interpreter, explained he had pain in his arm and was told to put ice on it and to take some over the counter pain medication. The nurse further advised claimant she could not send him to the doctor. Claimant then went to a supervisor complaining of arm pain and was told to perform lighter work or work more slowly.

Claimant returned to work and neither requested nor sought any additional medical treatment. On April 30, 2002, claimant's employment with respondent was terminated. Claimant and approximately 35 other employees were terminated because they did not have valid social security numbers.

In May 2002 claimant sought chiropractic treatment for his arm pain. After a few treatments, the chiropractor referred claimant to Dr. Robert L. Bassett. On May 28, 2002, Dr. Bassett took x-rays and claimant was given an injection in his right elbow. During this time period claimant also worked as a roofer for a friend. He only worked a few days each month removing roofing and noted he primarily used his left hand. He also worked at the Holiday Inn for a week and his pain worsened to the point he did not return to that job.

On June 27, 2002, claimant, by certified letter to respondent, made a claim for benefits as a result of repetitive injuries suffered on or about December 1, 1997, through May 1, 2002.

Respondent's primary argument is claimant failed to give timely notice of his work-related injury and that he did not establish just cause sufficient to warrant extension of time for giving timely notice.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Initially, it must be determined whether either the conversation claimant had with the nurse or with his supervisor in February 2002, provided notice of a workplace accident. The ALJ concluded the conversation did not provide either the nurse or supervisor with sufficient information to place the respondent on notice that claimant was claiming an accident. The Board agrees.

When claimant went to the nurse in February 2002, his friend Salvador Castillo accompanied him to act as an interpreter. Mr. Castillo testified:

Q. [Mr. Boone] Okay, but just a minute. We are making a record, this lady is typing in English and so I'm going to ask you to be very clear and careful and speak to this lady, the reporter, and say to her so we can all hear the words you spoke in English, in English, to the nurse, about Angel, please.

A. [Mr. Castillo] I tell the nurse he [claimant] have a pain in the elbow. And she tell me he can put on ice and take a couple pills and that's what I said.²

Mr. Castillo further testified that claimant's supervisor was told the same thing.

² Castillo Depo., at 12.

Neither conversation mentioned the cause for claimant's arm pain or that it was related to work. Such information does not constitute notice of the time, place and particulars of an accident. And claimant never made any additional requests for treatment or allegations of a work related accident as he continued working until his termination from employment.

The dispositive issue is whether claimant had just cause to fail to provide notice until June 27, 2002, which would be within 75 days after the last day claimant worked. Claimant admitted that he was aware of the requirement to notify the respondent of any workplace accident.

Claimant argues his inability to speak English was just cause for his failure to provide timely notice. But claimant also argued that he gave notice within 10 days. It is inconsistent to argue that there was an inability to give notice when claimant recognized the language problem and had an interpreter present when he sought medical attention. And claimant agreed he was aware of the requirement to notify the respondent of any workplace accident.

Claimant further argued that he was afraid he would be fired if he reported a workplace accident. But that reason was no longer valid after he was terminated and he still did not report the alleged accident until approximately two months later.

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence.³

The issues raised by claimant revolve around the credibility of the claimant. The ALJ pointed out the claimant's testimony was inconsistent regarding when he reported arm pain and that he continued working without any further report of injury or request for medical treatment until after he was terminated from employment.

The Board gives some deference to an ALJ's ability to assess the credibility of live testimony witnesses. In this instance, the ALJ concluded the claimant's testimony was not sufficiently credible to establish that he either gave notice or to establish just cause for enlargement of the notice period to 75 days. The Board agrees and finds claimant has failed to prove that notice was provided in a timely fashion and further failed to show just cause for the delay in providing notice to respondent of this alleged accidental injury.

The finding that claimant failed to provide respondent with timely notice of the series of mini-traumas and accidents renders the remaining issues moot.

³ See K.S.A. 44-501 and K.S.A. 44-508(g).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated February 18, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

BOARD MEMBER

c: Caleb Boone, Attorney for Claimant
Roger McClellan, Attorney for Respondent and Connecticut Indemnity Co.
Steven Marsh, Attorney for Respondent and Liberty Mutual Insurance
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation